R & S Truck Body Company, Inc. *and* National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO. Case 9–CA–38372

June 22, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

Pursuant to a charge filed on March 29, 2001, the Acting General Counsel of the National Labor Relations Board issued a complaint on April 2, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 9–RC–16781. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On April 16, 2001, the Acting General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On April 18, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of its objections to the election and the Board's disposition of certain challenged ballots in the representation proceeding.[1]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[2] We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the manufacture of truck bodies at its Allen, Kentucky facilities.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations described above, sold and shipped goods valued in excess of $50,000 to points outside the Commonwealth of Kentucky.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and

[1] The Respondent's answer denies that the certified unit is appropriate. The Respondent, however, stipulated to the appropriateness of the unit in the underlying representation case. Any question regarding the appropriateness of the unit could and should have been raised in the representation proceeding. *Playhouse Square Foundation*, 291 NLRB 995 fn. 1 (1988). To the extent that the Respondent's denial may call into question the resolution of certain unit placement issues in the representation case, those issues are not properly litigable in this unfair labor practice proceeding. Accordingly, we find that the Respondent's denial of this allegation does not raise any issue warranting a hearing in this proceeding.

[2] In opposing the Motion for Summary Judgment, the Respondent cites various changed circumstances that have occurred since the 1996 election, including: (1) substantial employee, supervisory, and managerial turnover in the unit; (2) changes in ownership; (3) relocation to another facility that is approximately 4 miles from the previous facility and is substantially different in size, layout, age and functionality; and (4) substantial changes in employee benefit and incentive plans and compensation. The Respondent asserts that these changes provide "good reason to believe" that the Union no longer has majority support. However, it is well established that, absent unusual circumstances, a union's majority status is *irrebuttably* presumed to continue during the year following the union's certification, and that the kinds of changes cited by the Respondent do not constitute unusual circumstances. *Ray Brooks v. NLRB*, 348 U.S. 98 (1954); and *Action Automotive*, 284 NLRB 251 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989). The court decisions cited by the Respondent requiring consideration of changed circumstances in determining the propriety of a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), are clearly distinguishable as they do not involve a Board certification. Finally, the Respondent does not contend that the changed circumstances have rendered the certified unit inappropriate. In any event, even accepting as true the Respondent's description of the postelection changes, we find that they are insufficient to warrant reexamination of the certified unit. See *Atlantic International Corp.*, 246 NLRB 291, 295–296 (1979), enfd. 664 F.2d 1231 (4th Cir. 1981); and *South Pacific Furniture*, 241 NLRB 488 (1979), enfd. 627 F.2d 173 (9th Cir. 1980). See also *Super K-Mart*, 322 NLRB 583 (1996) (unilateral changes following election do not constitute a basis to reconsider certification).

Chairman Hurtgen does not agree that the postelection changes, if true, would not warrant reexamination of the appropriateness of the unit. However, he notes that the proffered evidence is conclusionary and does not specifically address the issue of appropriateness of unit. In these circumstances, Chairman Hurtgen agrees that a hearing is not necessary.

(7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held October 11, 1996, the Union was certified on March 9, 2001, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by [Respondent] at its main and "Page" facilities located at 5165 Kentucky Route 1428, Allen, Kentucky, including, but not limited to crew leaders, miscellaneous labor, welders, janitors, power take-off, truck drivers, electricians, mechanics, aluminum wash, quality control inspectors, painters, clean-up/production, forklift operators, outside clean-up, small parts, special equipment operators, fitters, tackers, press/shear, trailer assembly, parts runner, parts window clerk, receiving clerk, shipping clerk, shipout clerk and UPS shipping clerk, but excluding all sales persons, managerial employees, office clerical employees and all professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

About March 12, 2001, the Union, in writing, requested the Respondent to bargain, and about March 19, 2001, the Respondent, in writing, refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 19, 2001, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, R & S Truck Body Company, Inc., Allen, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by [Respondent] at its main and "Page" facilities located at 5165 Kentucky Route 1428, Allen, Kentucky, including, but not limited to crew leaders, miscellaneous labor, welders, janitors, power take-off, truck drivers, electricians, mechanics, aluminum wash, quality control inspectors, painters, clean-up/production, forklift operators, outside clean-up, small parts, special equipment operators, fitters, tackers, press/shear, trailer assembly, parts runner, parts window clerk, receiving clerk, shipping clerk, shipout clerk and UPS shipping clerk, but excluding all sales persons, managerial employees, office clerical employees and all professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Allen, Kentucky, copies of the attached

[3] The Respondent's answer denies information sufficient to form a belief as to the truth of the complaint allegation that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. This denial, however, does not raise any issue warranting a hearing. The Respondent stipulated in the underlying representation proceeding that the Union is a Sec. 2(5) labor organization, and the Respondent did not contest the Union's labor organization status in the representation case.

notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 22, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with National Conference of Firemen and Oilers, Service Employees International Union, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees employed by us at our main and "Page" facilities located at 5165 Kentucky Route 1428, Allen, Kentucky, including, but not limited to crew leaders, miscellaneous labor, welders, janitors, power take-off, truck drivers, electricians, mechanics, aluminum wash, quality control inspectors, painters, clean-up/production, forklift operators, outside clean-up, small parts, special equipment operators, fitters, tackers, press/shear, trailer assembly, parts runner, parts window clerk, receiving clerk, shipping clerk, shipout clerk and UPS shipping clerk, but excluding all sales persons, managerial employees, office clerical employees and all professional employees, guards and supervisors as defined in the Act.

R & S TRUCK BODY COMPANY, INC.